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No. 07-1289

Supreme Court, U.S.
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In The

Supreme Court of the United States

NORMAL PARM, JR., ET AL.,

Petitioners,

v.

MARK SHUMATE, in his official capacity as Sheriff of East Carroll Parish, Louisiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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INTRODUCTION

This case involves matters of trespass on non-navigable private land that is occasionally flooded by waters from the Mississippi River. Petitioners assert that they have a right to trespass under the guise of a previously unrecognized constitutional right to fish. This case does not merit review because it involves fact-intensive matters of Louisiana state law and because the decision below does not conflict with any decision of any other federal court of appeal, is not in conflict with a decision of a state court of last resort and does not conflict with any prior decisions of this Court. This case rests and turned on established principles of law applied to a particular set of facts which were painstakingly developed and carefully analyzed not only in this case, but in ten years of related litigation in the Louisiana state courts. The Petition thus lacks a basis for the exercise of this Court's jurisdiction. The decisions below should not be disturbed. The respondent, a Sheriff of a single Parish in rural Louisiana who has borne the brunt of defending Petitioners' claims, respectfully urges this Court to deny the Petition.

STATEMENT OF THE CASE

The Petitioners are a group of recreational fishermen who were arrested for trespass in Louisiana when they refused to leave private property owned by Walker Cottonwood Farms, L.L.C., successor in

interest to Walker Lands, Inc. The Petitioners postulate that the respondent East Carroll Parish Sheriff Mark Shumate is prohibiting them and all others from fishing or otherwise enjoying the Mississippi River. That is simply not the case. This property is undeniably private property that is dry most of the year and is replete with roadways, buildings, crop land, small lakes, ponds, and standing timber that preclude its use as a navigable waterway or highway of interstate commerce. *See Walker Lands, Inc. v. East Carroll Parish Police Jury*, 38,376, 871 So.2d 1258 (La. App. 2nd Cir. 4/14/2004), *writ denied*, 2004-1421, 916 So.2d 127 (La. 6/3/2005);[1] *Parm v. Shumate*, 513 F.3d 135, 138, 139-140 (5th Cir. 2007).[2] Although a small part of the property at issue borders the navigable channel of the Mississippi River, the property extends in some places three miles from the "top bank" of the river as shown on the 1998 U.S. Corps of Engineers' official Navigation and Flood Control Map, submitted as evidence by the Sheriff.[3] In short, the

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[1] This opinion is also reproduced at Pet. App. pp. 101-122.

[2] The opinion below, also reproduced at Pet. App. pp. 1-22.

[3] This map was entered in evidence as defendant's Exhibit J, and is attached hereto as an Appendix inside the back cover of this Brief, with a legend showing the key for the "top bank" appearing on the reverse side. It is noted that the defense exhibit is more recent than the map offered by the plaintiff, as noted at oral argument in the district court. The Petitioners' map is vintage 1994, but indicates that it is based on 1967 imagery that was last field-checked in 1970.

property is not "the River," as the Petitioners would have the Court believe.

As privately owned property above the federal high-water mark, the Walker property is not subject to the federal navigational servitude. Additionally, the Louisiana courts have specifically held that this property is non-navigable, non-public trust lands, even when flooded by the backwaters of the Mississippi River during times of high river stages at certain times of the year. Under these conditions, the use of the property, even when flooded, remains governed by state law. The courts below properly found, under the facts of this case and the particular circumstances presented, that the Petitioners have no right under state or federal law to go upon the property to fish or hunt.

The Petitioners assert various legal theories in support of their asserted federal "right" to fish. Their reliance is uniformly misplaced. These authorities are concerned with rights of navigation in commerce preserved under federal law and confirm that regulation of the property at issue rests in the State. It is not disputed that commercial navigation rights exist on the Mississippi River, which passes near the property at issue. It is equally without question, however, that the actions of the landowner in seeking the Sheriff's protection from trespass do not interfere with traditional uses of the River as a highway of commerce.

The property rights Walker has asserted do not extend below the high bank of the River as established under federal regulations. The use of this property is governed therefore by Louisiana state law. What gave rise to the Petitioners' claims was their invasion of private property three miles inland from the Mississippi River that occasionally receives flood waters of the River. The Sheriff simply enforced the property rights of a complaining private land owner, rights which are clearly and explicitly protected by the constitutions and laws of the United States and of Louisiana. Any interests the Petitioners may have in recreational fishing must yield to these private property rights.

ARGUMENT

I. NEITHER THE UNITED STATES CONSTITUTION NOR FEDERAL LAW OFFER PROTECTION FOR RECREATIONAL FISHING ON FLOODED PRIVATE PROPERTY IN LOUISIANA

The Petitioners claim a federally protected right to recreational fishing on the Walker property. But they can point to no specific statute or constitutional provision that specifically creates such a right. The applicable statutes and constitutional provisions, along with the cases decided thereunder, instead confirm that Petitioners' interest in unchecked recreational fishing is not of federal concern.

The United States Constitution, in the context of this litigation, is concerned only with the regulation of interstate commerce and the preservation of navigable bodies of water, such as the shipping channel of the Mississippi River, as highways of commerce. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988). To the extent that state laws governing property rights do not infringe upon such use, federal law does not usurp state law, even to protect recreational fishermen floating on flooded private property. *Id.* at 795, 798-799 (recreational fishing rights "have nothing to do with navigation . . . "). Here, the actions of the Sheriff in arresting the Petitioner fishermen had no relation to the use of the Mississippi River as a highway of commerce. To the contrary, the undisputed facts show that the Petitioners were arrested well beyond the legally navigable and protected channel of the Mississippi River.

The definition of high water mark is stated in federal law as "the line[s] on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas." 29 C.F.R. 329.11(A)(1). The state court decisions in the parallel proceeding observed that the Walker property has all of the distinguishing elements of land that sits above the high water mark for

federal purposes.[4] In addition, as shown on the federal navigation map submitted at the summary judgment hearing as Exhibit J by the Sheriff, the "top bank" of the western bank of the Mississippi River in the vicinity of the subject property is right alongside the regular channel of the river, and does not extend far, if at all, onto the subject property in Louisiana at its very northeastern corner. The Petitioners were arrested on the Walker property several miles west of the delineated "top bank."

Thus defined, the bed of the navigable River and the extent of a federal right to fish (even if one exists) would not extend over the Walker property, which, as found by the state courts, is ordinarily dry riparian land that is "not wrested of its vegetation" despite being occasionally exposed to flood water from the River. *See Walker Lands, supra*; *see also U.S. v. C. E. Harrell*, 926 F.2d 1036, 1041-1042 (11th Cir. 1991); *and Goose Creek Hunting Club, Inc. v. U.S.*, 518 F.2d 579, 583 (Ct. Cl. 1975). In fact, courts have explicitly rejected attempts to expand the beds of navigable rivers, and concomitantly the federal navigational servitude, to riparian lands only inundated at a "river's peak flow or flood stages." *Harrell*, 926 F.2d at 1041, *citing Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221, 224, 67 L.Ed.2d 428 (1923).

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[4] The state district court opinion is summarized and referenced in the Fifth Circuit decision below. *Parm*, 513 F.3d at 139-140 (*see* Pet. App. at 7-9). The state appellate decision appears at Pet. App. pp. 101-122, as well as at 871 So.2d 1258.

There is no question that the bed of the Mississippi River is navigable where it passes near the Walker property. Any navigational servitude that may apply to the River, however, would be limited to the bed of the River, and then only for use as a continuous highway of interstate commerce as authorized by the Commerce Clause of the U.S. Constitution. *See Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824, 832 (5th Cir. 1993); *citing Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979). This servitude is not unlimited. It does not grant recreational fishing rights over flooded private property. *See Scranton v. Wheeler*, 179 U.S. 141, 160, 21 S.Ct. 48, 56, 45 L.Ed. 126 (1900) ("It is commerce, and not navigation, which is the great object of constitutional care. The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more the regulation and control of them for purposes of commerce.").

This Court has long recognized that "the title and rights of riparian or littoral proprietors in the soil below the high-water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United

States by the constitution." *Shively v. Bowlby*, 152 U.S. 1, 40, 14 S.Ct. 548, 563, 38 L.Ed. 331 (1894). The "rights granted to the United States by the Constitution" in this respect include only rights of commercial navigation and to keep the navigable highways of commerce open. This Court recognizes that issues of public rights in access to waterways "not related to navigability, such as bathing, swimming, recreation, fishing, and mineral development . . . ," are matters of state law concern. *See Phillips Petroleum*, 484 U.S. at 482-484, 108 S.Ct. at 798-799.

A distinction exists between the navigation protected by federal law and the private hunting and fishing promoted by the Petitioners. Navigation as contemplated by the Constitution is commerce. The Petitioners' recreational fishing and hunting are pleasurable distractions. The former is essential to the public interest and is protected by the Constitution, laws, and regulations of the United States; the latter are not. *See George v. Beavark*, 402 F.2d 977, 979-981 (8th Cir. 1968) (" . . . none of the authoritative cases has liberalized the rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would constitute navigability.").

Consequently, even if the federal navigational servitude extended three miles beyond the bank of the Mississippi River (it does not) *and* encompassed the portion of the Walker property at issue (it does not), it would not protect the unlawful fishing practices of the Petitioners on private property. Any common rights to the simple enjoyment of navigable

waterways were retained by the States as sovereigns, not transferred to the federal government by the Equal Footing Doctrine. The States, upon entry into the Union, granted specific and limited authority to preserve and protect navigation in commerce to the federal government by way of the Constitution:

> At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States. . . . The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Phillips Petroleum, 484 U.S. at 473-474, 108 S.Ct. at 98 L.Ed.2d 877; *citing Shively*, 152 U.S. at 57, 14 S.Ct. at 569.

This Court has confirmed that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to regulate private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S. at 475, 108 S.Ct. at 794; *citing Shively*, 152 U.S. at 26, 14 S.Ct. at 557. Lands under navigable waterways were "given to the States upon their entry into the Union, subject to the federal navigation easement and the power of

Congress to control navigation on those streams under the Commerce Clause." *Phillips Petroleum*, 484 U.S. at 479, 108 S.Ct. at 797 (citation omitted). The title to and rights in such lands and waterways are then matters left to state law, which this Court recognized may be different among the several States. *See Phillips Petroleum*, 484 U.S. at 483, 108 S.Ct. at 799; *quoting Shively*, 152 U.S. at 26, 14 S.Ct. at 557 ("there is no universal law on the subject: but . . . each State has dealt with the lands under tidewaters within its borders according to its own views of justice and policy.").

Even if the Walker property were considered tidelands or public trust lands governed by the Equal Footing Doctrine,[5] Louisiana, as sovereign, has the authority to make such laws respecting private rights in that property as it sees fit, as long as the federal interests in commercial navigation are not impaired thereby. The decision rendered below by the Fifth Circuit did not hold that recreational fishing is not permitted on navigable waterways. What the Fifth Circuit found, based on established precedent, was that federal law on the subject of navigable waterways is concerned with navigation on said navigable waterways as highways of commerce. Fishing rights

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[5] *See Walker Lands*, 871 So.2d at 1261, Pet. App. at 103 ("At trial, it was determined that Gassoway Lake did not exist in 1812, . . . the year Louisiana was admitted into the Union. The land where Gassoway Lake now sits was either woods or farmland in 1812, west of the Mississippi River.").

as may be protected by a State as the sovereign, on the other hand, are matters of state law.

A variation of this premise was recognized in the *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 (1873), which involved a challenge to Louisiana state laws that granted exclusive rights to slaughter-house operations along sections of the Mississippi River at New Orleans to a private entity. This Court held that the grant of exclusive rights in land above the low water mark of the River to private interests did not violate the Constitution or Louisiana's grant of authority over commercial navigation to the federal government.

In *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931), the court addressed rival claims of glass-bottomed boat operators on beautiful Silver Springs, undisputably a navigable highway of interstate commerce protected by federal law. The court held that this navigable waterway could not be claimed as the exclusive waterway of one of the excursion operators by virtue of its ownership of adjacent lands. The Walker property, in contrast, is not the bed of a federal highway of water-borne commerce, it is "fast" land, not subject to the federal servitude or the holding of *Silver Springs*. *See Silver Springs*, 50 F.2d at 358 ("Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water.").

Other cases noted by the Petitioners recognize that the individual States have the authority to regulate the disposition and use of non-navigable property adjacent to navigable waterways. *See Lawton v. Steele*, 152 U.S. 133, 138, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894) (the preservation of game and fish fall within the ambit of the State's police power "and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts."); *Merrill-Stevens Company v. Durkee*, 62 Fla. 549, 560, 57 So. 428, 432 (Fla. 1912) (a State may transfer ownership in whole or in part of land beyond the edge of a navigable channel to private interests, "leaving full space for the requirements of commerce," but reserving to the private owners the right to make whatever constructions on the property they desired "and also the right to prevent encroachments of any other person upon all such submerged lands . . . , . . . and to have and maintain action of trespass in any court of competent jurisdiction in the state, for interference with such property.") (citation omitted); *Martin v. Waddell's Lessee*, 41 U.S. 367, 411, 16 Pet. 367, 10 L.Ed. 997 (1842) (following the American Revolution, the States have sole authority over property rights, including those related to aqueous property, subject only to the rights surrendered by the States through the Constitution to the federal government.); *see also* 33 U.S.C. 10.

Although the Equal Footing Doctrine guarantees that the lands underlying navigable waterways when a State entered the Union are to be held as "common highways . . . forever free . . . ," this doctrine pertaining to navigable waterways "was never intended to apply to streams only capable of an imperfect navigation in time of floods and very high water. Such streams or dry bayous must be considered as under the entire control of the State." *Boykin v. Shaffer*, 13 La. Ann. 129, 1858 WL 5070, at 2 (La. 1858).

The Louisiana Supreme Court in *Boykin* held that a private company could be authorized by the State to construct locks and other improvements on a bayou that was only occasionally navigable and held that the private company's restrictions on navigation through its locks were authorized by Louisiana law. The *Boykin* decision also found that the Equal Footing Doctrine did not prohibit the privatization of the bayou passage because the waterway was non-navigable to start with, and thus the State had the authority to alienate it in full or in part to private persons. The Louisiana Supreme Court observed that "Were the mere fact that a steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression of the soil on the banks of the Mississippi would then become a navigable stream and should be opened for the benefit of rafts and boats, and the convenience of a few persons, to the total destruction of the planting interests on the banks of the river." *Id.* at 2. The Louisiana

Supreme Court rejected the notion that occasional flooding of private, non-navigable property authorizes the exercise of the sort of activities sought to be pursued by the Petitioners on the Walker property.

The Equal Footing Doctrine calls for state, not federal, regulation of fishery. This state regulation does not offend the Commerce Clause or federal admiralty or maritime jurisdiction. *See Smith v. Maryland*, 59 U.S. 71, 74-75, 18 How. 71, 15 L.Ed. 269 (1855) (the seizure of a commercial oyster boat for using dredging instruments in violation of state law did not violate the federal constitution, recognizing that a State may regulate the enjoyment of certain public rights, among which is the right to fish).

The Petitioners misconstrue the holding of the Fifth Circuit below. The Fifth Circuit did not address or limit in anyway the use of the navigable Mississippi River by anyone for any lawful purpose. To assert that tugboat operators and the weekend angler will now be subject to interrogation concerning their use of the navigable waterways is absurd. This case involved flooded, but non-navigable,[6] property that is unquestionably owned by a private person. The holding of the Fifth Circuit only applies to such property in Louisiana. The law recognizes that the

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[6] The Louisiana state courts, in a proceeding that lasted the better part of a decade, determined that the Walker property, even when flooded, is non-navigable. *See Walker Lands, Inc., supra.*

several States may treat similar property differently. The U.S. Constitution does not mandate uniformity in such state laws, except to the extent that such state laws may improperly impede commercial navigation.

Arguments made by the *Amici* group[7] supporting the Petitioners illuminate the dangerous extent of the Petitioners' sought-after usurpation of private property rights. These *Amici* suggest that the private property at issue should be available to all "for purposes of fishing, hunting, bird-watching, canoeing and kayaking, wildlife observation, and communing with nature." *See* Coalition *Amici* Brief, at page 5. This proposition would allow anyone to traipse across private property for any activity under the sun. Private property rights of a landowner would have no meaning. In addition, not only do the Petitioners and their *Amici* want to go wherever the water goes, apparently they expect to utilize any property "in proximity to such waters . . . " *See* Coalition *Amici* Brief, at page 6. If, as argued by the Petitioners and their *Amici*, "several millions of individuals" may intrude upon private property "for fishing, paddling, nature observation, and countless other activities"[8] with no regard for the private owners' rights, what's a property owner to do?

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[7] Identified as "A Coalition of Conservation, Wildlife, Fishing, and Wetlands Organizations Led by Restore Our Water Access, Inc." (the "Coalition").

[8] *See* Coalition *Amici* Brief, at pp. 7-9.

Far from "the greatest enclosure initiative ever seen in relation to the waters of the United States,"[9] the decision below only confirmed what has long been settled: a private landowner has the right to maintain an action for trespass by uninvited and unwanted persons. The Petitioners have an incalculable expanse of existing public areas where they may pursue whatever enjoyable pursuits they can envision (as long as it does not interfere with navigation). They are not losing *anything* with the Fifth Circuit's decision. The Fifth Circuit merely confirmed that persons without a claim to ownership may not have free and unabated access to private property under the cloak of an illusory federal "right to fish."

The property rights asserted by the private landowner herein, on the other hand, are far more than "illusory,"[10] as characterized by the Coalition *Amici*. The United States Constitution protects a citizen's property rights, as does the Louisiana Constitution. Recognition of a federal right to fish would critically impair these property rights. The Petitioners' plea to do so should be rejected.

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[9] *Id.* at page 8.

[10] *Id.* at page 23, n. 4.

II. THE PRIVILEGES AND IMMUNITIES CLAUSE DOES NOT PROTECT RECREATIONAL FISHING ON FLOODED PRIVATE PROPERTY

The Privileges and Immunities Clause of the United States Constitution[11] ensures that the citizens of any State in the Union shall enjoy the same rights in other States as do the residents of those other States.

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the

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[11] *See* U.S. CONST. art 14, sec. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ").

> citizens of the United States one people as this.

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 380-381, 98 S.Ct. 1852, 1858-1859, 56 L.Ed.2d 354 (1978); *quoting Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357 (1869); *see also Slaughter-House Cases*, 83 U.S. at 78-79 (the privileges and immunities protected by the Constitution "are those which belong to the citizens of the States as such, and . . . they are left to the State Governments for security and protection, and not by this article placed under the special care of the federal government.").

In *Baldwin*, this Court also noted that it has rejected an interpretation that the Privileges and Immunities Clause guarantees certain "natural rights" in every State. *Baldwin*, 436 U.S. at 381-382, 98 S.Ct. at 1859. Instead, the settled interpretation is that the Privileges and Immunities Clause guarantees that "in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens against other States in favor of its own." *Id.*; *quoting Hague v. CIO*, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L.Ed. 1423 (1939).

The *Baldwin* case also confirms that the Privileges and Immunities Clause is not concerned with recreational activities such as hunting or fishing, which are not among the "fundamental" rights or

activities protected by the Privileges and Immunities Clause:

> Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not – and cannot – contend that they are deprived of a means of a livelihood by the [licensing] system or of access to any part of the State to which they may seek to travel. We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a non-resident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

Baldwin, 436 U.S. at 388, 98 S.Ct. at 1863.

It is submitted that substitution of "fishing" for "elk hunting" and "Louisiana" for "Montana" provides sufficient reasoning for rejection of the Petitioners' claim for relief under the Privileges and Immunities Clause.

III. LOUISIANA LAW PROVIDES THAT THE OWNER OF FLOODED PRIVATE PROPERTY MAY EXCLUDE TRESPASSERS

The Fifth Circuit determined that under Louisiana law the Walker property is not burdened with a public servitude that would allow unrestricted access to the property for fishing, even while flooded by water from the Mississippi River. This holding is firmly rooted in established principles of Louisiana law. Petitioners have now apparently abandoned their arguments to the contrary in the courts below by failing to brief the issue to this Court.

Nevertheless, Respondent submits that the discussion by the Fifth Circuit and the authorities cited therein confirm that under Louisiana law property between the ordinary high and the ordinary low marks of a navigable river (the "bank") are "private things" subject to certain "public uses." La. C.C. art. 456.[12] "According to well-settled Louisiana jurisprudence, which continues to be relevant, the servitude of public use under this provision is not 'for the use of the public at large for all purposes' but merely for purposes that are 'incidental' to the navigable

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[12] Walker, the owner of the property at issue, has disputed whether the property may be classified as the "bank" of the River, and thus not subject to the limited bank servitude. As shown, accepting Petitioners' contention to the contrary as true, however, does not result in their being allowed access to the property. Therefore, the courts below did not decide the question of whether the Walker property was indeed the "bank" of the River.

character of the stream and its enjoyment as an avenue of commerce." *Id.*, comment (b) (citations omitted); *see also Buckskin Hunting Club v. Bayard,* 03-1428, 868 So.2d 266, 275-276 (La.App. 3rd Cir. 3/3/2004); *Walker Lands*, 871 So.2d at 1268, footnote 6. Recreational fishing on the banks of the Mississippi River is not a use incidental to navigation. *See Walker Lands*, 871 So.2d at 1268 n. 6 (citations omitted); *see also*, *State v. Barras,* 602 So.2d 301, 305 (La. App. 3rd Cir. 1992); *and Edmiston v. Wood,* 566 So.2d 673, 675-676 (La. App. 2nd Cir. 1990). The Petitioners' recreational activities are not protected by the Louisiana navigational servitude.

The Petitioners' "running waters" argument was also properly rejected by the Fifth Circuit below. Louisiana law provides that although "running water" from a navigable river is a public thing and a private landowner must allow the running waters to pass through his estate, Louisiana law "does not mandate that the landowner allow public access to the waterway." *Buckskin Hunting Club,* 868 So.2d at 274.

Louisiana law, therefore, does not support the Petitioners' claims for relief.

CONCLUSION

The decision below recognized that owners of private property that is occasionally flooded by backwaters of the Mississippi River may protect their property rights against recreational fishermen that intrude upon the private property during times of high water. The decision did not carve out any "recreational use exclusion" to the federal navigational rights. None of the constitutional provisions or laws cited by the Petitioners protect or even mention fishing on flooded private property. None directly addressed any fishing rights at all.

The Fifth Circuit's decision below does not affect federal navigation rights. The "navigation" contemplated and protected by federal law does not include recreational fishing. The use of the Mississippi River as a highway of commerce has nothing to do with Petitioners' claims and is untouched by the decision below.

In addition, the prohibition against unwanted trespass upon flooded private property recognized in the decisions below has no effect on the recreational use of navigable waterways of America. The private property at issue, even when flooded, has been determined to be non-navigable. That determination is unchallenged here. This case is not an attack on public access to navigable waters. This case is about a landowner's right to exclude trespassers who simply want to fish on legally non-navigable flooded private property. All of Petitioners' epic effusion directed at a

single Sheriff in rural Louisiana cannot change this simple fact.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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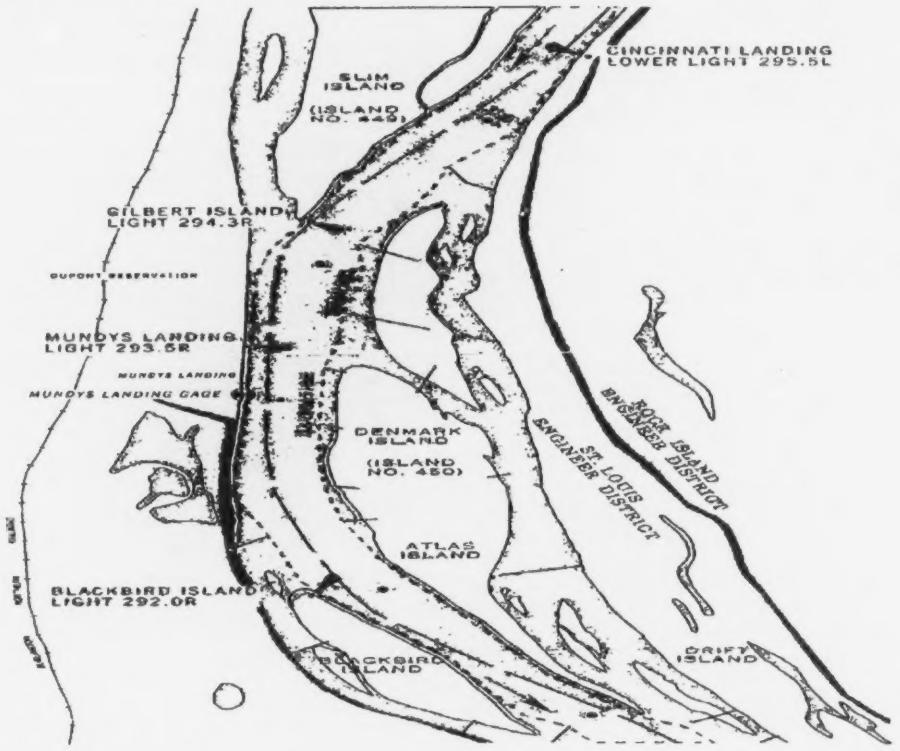
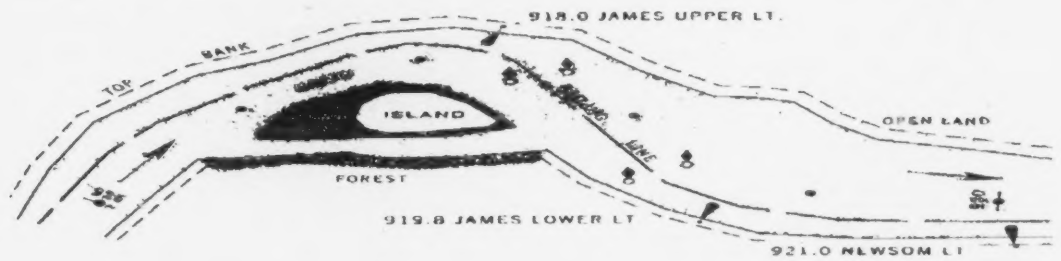
LEGEND

TYPICAL CROSSING CHANNEL ABOVE CAIRO, ILLINOIS



TYPICAL CROSSING CHANNEL BELOW CAIRO, ILLINOIS



Crossing channels marked by buoys during low water. Consult 'LOCAL NOTICE TO MARINERS' for detailed sailing directions.

See note in 'Notes Regarding Aids To Navigation' for more information. Navigation lights identified by river mile and name.

Waters Edge equals Low Water Reference Plane +5 (five) feet above Mile 320 AHP.
Waters Edge equals Low Water Reference Plane zero below Mile 320 AHP.

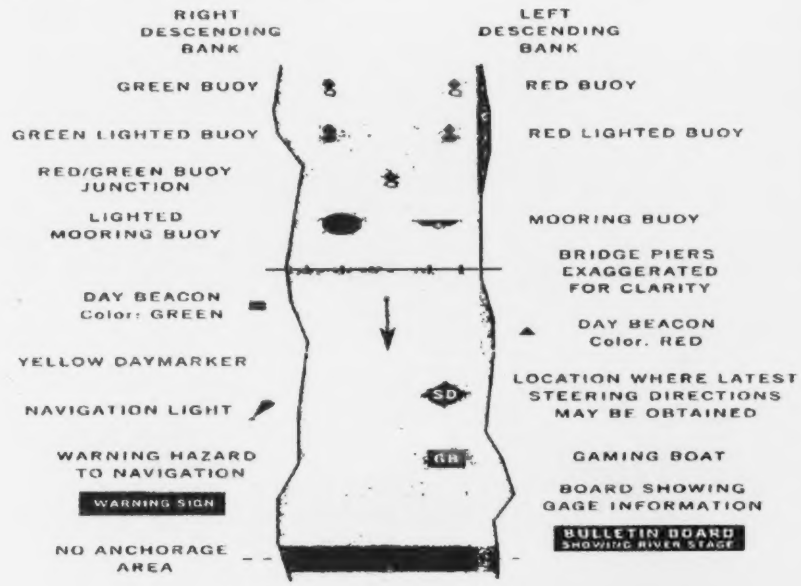
Daymarks may be identified as DBN.

The Color Magenta Is The 'Warning' Color For This Series of Maps.

SYMBOLS

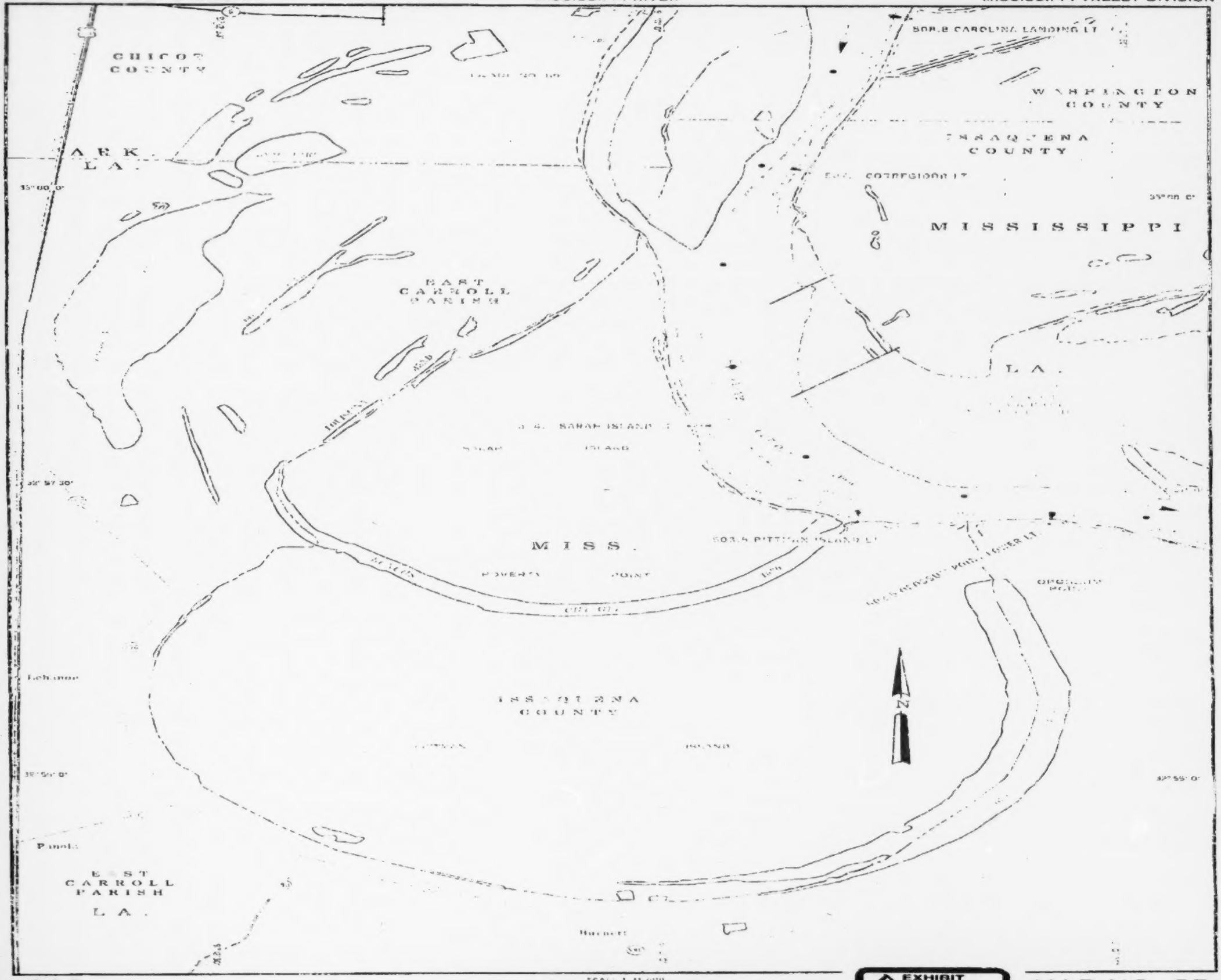
INTAKE OR DISCHARGE STRUCTURE		Road Markers	FEDERAL	61
GPS ANTENNA			STATE	19
ANTENNA			INTERSTATE	20

AIDS TO NAVIGATION



HYDROGRAPHIC

TOPOGRAPHIC



1998

SCALE 1:31,000
1 INCH = 2,583 FEET

EXHIBIT J

MAP NO. 85

App. 1